

bottles are distributed to grocers for display and sale to consumers.

In late 2007, San Pell and Nestlé learned that San Pell mineral water was appearing in brown cardboard cartons in supermarkets. The brown cartons were marked in plain bold type, “S. Pellegrino Sparkling Natural Mineral Water” on the front and back panels of the cases. The side panel of the packaging contained a small disclaimer concerning the derivation of the cases. Plaintiffs identify Renaissance in the Complaint as a New Jersey Corporation connected to Mark DeGeorge, another defendant. San Pell and Nestlé represent that that Mark DeGeorge was an officer, director, and/or shareholder of Renaissance, and was involved in the repackaging and sale of San Pell mineral water.

On June 17, 2008, San Pell and Nestlé filed suit in the Southern District of New York against multiple defendants alleging the improper repackaging, reselling, or distributing of their product without their knowledge. The suit, which was transferred to this Court on November 14, 2008, includes eight counts: violations of 15 U.S.C. § 1114(1) (Count I), violations of 15 U.S.C. § 1125(a) (Counts II and III), false and misleading representation (Count IV), violations of the New York General Business Law (Counts V and VI), common law unfair competition (Count VII), and common law conspiracy to undertake unfair methods of competition and deceptive trade (Count VIII).

In lieu of responding to the Complaint, Renaissance filed a motion to dismiss, arguing that Plaintiffs’ Complaint should be dismissed pursuant to Rule 12(b)(6) as against Renaissance because Mark DeGeorge was never an officer, director, and/or shareholder of Renaissance. Renaissance attached to its brief certifications of Mark DeGeorge and Russ Coniglio, the President of Renaissance, in support of the assertion that Mark DeGeorge was never an officer,

director, and/or shareholder of Renaissance. Also, Renaissance argued that Plaintiffs' Count VIII alleging civil conspiracy should be dismissed because there is no such available claim under New York common law.

On March 20, 2009, San Pell and Nestlé filed a response in opposition to Renaissance's motion to dismiss, arguing that Renaissance cannot rely on matters extraneous to the pleadings to support its motion to dismiss, and that civil conspiracy is actionable under New York common law when linked to another properly pleaded tort claim, here unfair competition and deceptive trade practices.

II. LEGAL STANDARD

In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court must accept Plaintiff's allegations, along with all reasonable inferences that may be drawn from them, as true. Doe v. Delie, 257 F.3d 309, 313 (3d Cir. 2001) (citing Piecknick v. Commonwealth of Pennsylvania, 36 F.3d 1250, 1255 (3d Cir. 1994)). The Court may dismiss the Complaint only if Plaintiff can prove no set of facts that would entitle him to relief. Burstein v. Retirement Account Plan for Employees of Allegheny Health Educ. & Research Found., 334 F.3d 365, 374 (3d Cir. 2003) (citation omitted). Nevertheless, factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007).

III. ANALYSIS

A. DeGeorge's Relationship With Renaissance

The Court will not dismiss Plaintiffs' claims against Renaissance based upon documents extraneous to the pleadings. As a general matter, a District Court ruling on a motion to dismiss

may not consider matters extraneous to the pleadings. In Re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997); Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir. 1985). However, there are exceptions to this rule. Mele v. Federal Reserve Bank of N.Y., 359 F.3d 251, 255 n. 5 (3d Cir. 2004). In addition to the allegations of the complaint, a court may consider matters of public record, documents specifically referenced in or attached to the complaint, and documents integral to the allegations raised in the complaint. See Mele, 359 F.3d at 255 n. 5.

Renaissance's motion to dismiss relies upon a certification and a brief submitted by Michael Pasquale, attorney for Renaissance. The certification contains two attached exhibits: 1) Exhibit A, statements made by Russ Coniglio, Renaissance President, claiming that Mark DeGoerge is not, and has never been, an officer, director and/or shareholder of Renaissance, and 2) Exhibit B, statements made by Mark DeGeorge claiming that he is not, and has never been, an officer, director, and/or shareholder of Renaissance. These exhibits counter the allegations in Plaintiffs' Second Amended Complaint that "upon information and belief, DeGeorge is an officer, director, and/or shareholder of Renaissance." (Compl. ¶ 9.)

The exhibits are documents extraneous to the pleadings, and do not fall within exceptions to the rule prohibiting this Court from considering them on a motion to dismiss. See Mele, 359 F.3d at 255 n. 5. An "undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss" is only deemed integral within the exceptions if the plaintiff's claims are based on the document. Pension Benefit Gauranty Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1996 (3d Cir. 1993). In this case, the pleadings are not based on statements made by Russ Coniglio and Mark DeGeorge. Therefore, the exhibits from the certification are not integral to

the pleadings. They instead present a factual dispute over Mark DeGeorge's relationship with Renaissance. In Dovale v. Marketsource, Inc., the case relied upon by Renaissance to persuade the Court that Exhibits A and B are integral, the District Court ruled that a Marketing Services Agreement and an amendment to that agreement which were explicitly mentioned in plaintiff's amended complaint were integral. 2006 WL 2385099, at *5-6 (D.N.J., August 17, 2006) (emphasis added). The exhibits in the instant motion were never mentioned or relied upon in the Complaint in this case. Id. at *6. They are thus distinct from those in Dovale. Id.

Without considering documents extraneous to the pleadings, Renaissance's motion to dismiss the whole of Plaintiff's Complaint pursuant to Rule 12(b)(6) must be denied. In their motion to dismiss, Renaissance claims that Plaintiffs "incorrectly" asserted the relationship between Mark DeGeorge and Renaissance. As the relationship between DeGeorge and Renaissance is a matter of fact and not law, it is not grounds for dismissing the Complaint on Renaissance's Rule 12(b)(6) motion.

Renaissance also claims that San Pell and Nestlé "baldly" asserted the relationship between DeGeorge and Renaissance. Under the Supreme Court's pleading standard refined in Bell Atlantic v. Twombly, and extended in the Third Circuit beyond antitrust lawsuits in Phillips v. County of Allegheny, a complaint must only allege enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary elements of a charge. Twombly, 550 U.S. at 555; Phillips, 515 F.3d 224, 231 (3d Cir. 2008). Plaintiffs' Complaint alleges that, upon information and belief, DeGeorge is an officer, director, and/or shareholder of Renaissance and that DeGeorge and Renaissance assisted in the repackaging, reselling, or distributing of San Pell mineral water in unauthorized packages. These allegations are sufficient to survive a

12(b)(6) motion. Twombly, 550 U.S. at 555; Phillips, 515 F.3d at 231. Whether or not DeGeorge is an officer, director, and/or shareholder of Renaissance, and whether Renaissance participated in the alleged conduct can reasonably be expected to be revealed in discovery. Accordingly, the Court will deny Renaissance's 12(b)(6) motion to dismiss the whole of Plaintiffs' Complaint.

B. Civil Conspiracy

Plaintiffs have pled civil conspiracy by properly pleading the underlying tort claims upon which they base their conspiracy claim. It is well settled under New York law that there is no substantive tort of conspiracy.¹ Antonios A. Alevizopoulos and Associates, Inc. v. Comcast Intern. Holdings, Inc., 100 F. Supp. 2d 178, 187 (S.D.N.Y. 2000); Bracket v. Griswold, 112 N.Y. 454, 467 (N.Y.A.D. 1989) ("a mere conspiracy to commit a [tort] is never of itself a cause of action"). However, allegations of conspiracy are permitted to connect the actions of separate defendants with an otherwise actionable tort that is properly pled. Alexander & Alexander of New York, Inc. v. Fritzen, 68 N.Y.2d 968, 969 (N.Y.A.D. 1986).

Plaintiffs' claims of unfair competition and deceptive trade practices in Count VII present two actionable torts upon which they may base their civil conspiracy claim in Count VIII. See Goldstein v. Garlick, 318 N.Y.S.2d 370, 372 (N.Y.S.C. 1971). An unfair competition claim under New York common law involves the "bad faith misappropriation of the labors and expenditures of another, likely to cause confusion or to deceive purchaser as to the origin of the goods". Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc., 58 F.3d 27, 34 (2d Cir. 1995);

¹ The parties do not dispute that New York law governs Plaintiffs' state common law claims alleged in the Complaint.

Rosenfeld v. W.B. Saunders, Inc., 728 F.Supp. 236, 249-50 (S.D.N.Y. 1990) (quoting Computer ASSocs. Int'l, Inc. v. Computer Automation, Inc., 678 F.Supp. 424, 429 (S.D.N.Y. 1987)). To state a claim for unfair competition in New York, a plaintiff must show either actual confusion or a likelihood of confusion as to the origin of the goods at issue along with some showing of bad faith. Milstein, Inc., 58 F.3d at 35; Saratoga Vichy Spring Co., Inc. v. Lehman, 625 F.2d 1037, 1044 (3d Cir. 1980); 104 N.Y. Jur. 2d Trade Regulation § 196. A plaintiff may show bad faith by demonstrating that the “defendants adopted [their] mark with the intention of capitalizing on [the] plaintiff’s reputation and goodwill and any confusion between his and the senior user’s product.” Arrow Fastener Co., Inc. v. Stanley Works, 59 F.3d 384, 397 (2d Cir. 1995) (quoting Lang v. Retirement Living Pub. Co., Inc., 949 F.2d 576, 583 (3d Cir. 1991)); Brockmeyere v. The Hearst Corp., 2002 WL 1402320, at *11 (S.D.N.Y. June 27, 2002). Bad faith may be inferred from a plaintiff’s complaint and need not be explicitly pled. Fairfield Financial Mortg. Group, Inc. v. Luca, 584 F.Supp. 2d 479, 488 (E.D.N.Y. 2008) (holding that bad faith could be inferred from plaintiff’s complaint against defendant with whom plaintiff had non-competition agreement).

Plaintiffs’ Complaint sufficiently pleads the elements of unfair competition against Renaissance. Plaintiffs contend in their Complaint that Renaissance and other defendants have and continue to “engage in unauthorized re-packaging, selling and distribution in interstate commerce of 15 750 ml bottle cases of S. Pellegrino Sparkling Mineral Water in cases similar to or identical to the Unauthorized Cases”. (Compl. ¶ 26-27.) Based upon Renaissance’s alleged actions, it is reasonable to expect that discovery will reveal evidence that their practices created a likelihood of confusion to deceive the purchaser. See Twombly, 550 U.S. at 555. It is also

reasonable to infer that Renaissance's actions were preformed in bad faith. See Fairfield Financial Mortg. Group, Inc. v. Luca, 584 F.Supp. 2d 479, 488 (E.D.N.Y. 2008). The alleged acts, acquiring San Pell water and repackaging and distributing it in cases that bear the S. Pellegrino name with only a small disclaimer concerning their derivation from authorized cases, are enough for this Court to infer bad faith. (Compl. ¶ 25); See Laureyssens v. Idea Group, 964 F.2d 131, 136 (S.D.N.Y. 1992) (holding that evidence of intentionally copying trade dress or product design can support inference of intent to benefit from good will of prior user through confusion). Plaintiff also explicitly alleges that "Defendants' acts have been committed in bad faith with the intent and purpose of misappropriating and trading upon the goodwill reputation created by plaintiffs in association with the S. Pellegrino mark." (Compl. ¶ 53.)

The Count VII claim for unfair competition was properly pled and is an actionable tort to which Plaintiffs may attach their Count VIII claim of civil conspiracy. See Goldstein, 318 N.Y.S.2d at 372. Count VIII is this properly pled, and the Court will deny Renaissance's 12(b)(6) motion to dismiss Count VIII.²

IV. CONCLUSION

Based upon the foregoing, the Court will DENY Renaissance's motion to dismiss. An accompanying Order shall issue today.

Dated: 8-10-09

/s/ Robert B. Kugler
ROBERT B. KUGLER
United States District Judge

² Renaissance's motion alleges the insufficiency of Plaintiffs' Count VIII, and this Court has determined that Plaintiffs' civil conspiracy claim may be grounded on the unfair competition claim in Count VII. The Court does not now, and needs not, assess the sufficiency of Plaintiffs' deceptive trade practices claim to rule on the motion with respect to Count VIII.